Date: September 23, 1997

Case No.: 95-INA-437

In the Matter of:

LAMY ENTERPRISES,
Employer

On Behalf Of:

JOSE ALEJANDRO RODRIGUEZ,
Alien

Appearance: Liliana Santos-Caballero, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

**Statement of the Case**

On August 26, 1993, Lamy Enterprises, Employer, filed an application for alien employment certification to enable Jose Alejandro Rodriguez, Alien, to fill the position of carpenter. The duties of the job were described as follows:

> Constructs, erects, installs and repairs structures and fixtures of wood, plywood, and wallboard. Prepares layout. Marks cutting and assembly lines on materials. Assembles cut and shaped materials and fasten (sic) them together with nails, dowel pins, or glue.

The Employer did not require that applicants have experience in the job offered. However, the Employer did require two years of qualifying experience as a drywall finisher or taper. Special Requirements for the job required that applicants have a driver's license, own transportation, own hand tools, and verifiable references (AF 64).

The CO issued a Notice of Findings (NOF) proposing to deny certification on June 21, 1994 (AF 55-57). The CO stated that the two-year alternate experience requirement as a taper or drywall finisher is an unduly restrictive job requirement which appears to be tailored to meet the Alien's experience; that such experience could not provide someone with the skills needed to perform the duties of the advertised job. 20 C.F.R. § 656.21(b)(2). The Employer was advised of appropriate corrective actions.

On July 20, 1994, Employer requested and received an extension of time until August 30, 1994, to file its rebuttal (AF 21, 22). The Employer submitted rebuttal dated August 29, 1994 (AF 23-54). The Employer's rebuttal outlined the duties of a carpenter, which included studying blueprints, selecting lumber, assembling, cutting and shaping materials and fastening them together, erecting framework for structures, and laying sub floors. The Employer also outlined the duties of a drywall finisher, which included filling cracks and holes in walls and ceilings with sealing compound, installing metal molding at corners in lieu of sealant and tape, applying texturing compound and primer to walls and ceilings, using hammers, screwdrivers, spray guns, brushes, and rollers. The Employer contended that the Alien's talents are an asset to the Company when construction and carpentry work must be performed. The Employer stated that the job experience requirement is more than reasonably related to the tasks to be performed and that if the requirement were removed it would undermine the essence of the business operation; that it is essential for the safety and operation of the business. The Employer stated that it provides

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

drywall, carpentry, painting, and related services to customers and that if it cannot provide these services the work must be given to subcontractors. The Employer contended that the experience requirement is extremely essential to the operation and survival of its business. The Employer also stated that inasmuch as it has demonstrated that the experience requirement is not unduly restrictive, it has complied with the job advertising requirements set forth in the regulations.

The CO issued a second NOF on October 31, 1994 (AF 17-20). The CO stated that the Employer's experience requirement is unduly restrictive and appears to be tailored to the Alien's qualifications as a drywall taper and finisher; that the Alien does not possess the necessary knowledge, skills, and abilities to perform the job duties outlined in the labor certification application. The Employer was directed to delete the requirement or establish that it arises from a business necessity or demonstrate that it is a common requirement for this position. The CO also inquired as to why an applicant with two years of carpentry experience could not qualify for the job?

After requesting and receiving an extension of the rebuttal period, the Employer filed rebuttal on January 10, 1995 (AF 8-10). The Employer again argued that the two-year experience requirement as a drywall finisher or taper is a business necessity, the absence of which would undermine the essence of its business operation. The Employer stated that the requirement is not a preference, but rather essential to the safety and operation of the business. The Employer further stated that the duties of a drywall finisher/taper are similar to those of a carpenter and that the Alien is qualified for the job. The Employer did not respond to the CO's inquiry as to why an applicant with two years of carpentry experience could not qualify for the job.

The CO issued a Final Determination denying certification on March 22, 1995 (AF 5-7). The CO determined that the two-year experience requirement is unduly restrictive in that it would not provide someone with the skills needed to perform the advertised job duties. The CO also stated that the Employer had not addressed the issue raised in the second NOF as to why experience as a drywall finisher/taper was the only qualifying experience for this job; that based on the Employer's requirements, a carpenter with 10 years of experience could not qualify. The CO stated that it is most unusual that an Employer will not accept experience in the job offered, only in a related occupation.

The Employer requested administrative-judicial review on April 28, 1995 (AF 1-4), and by Counsel, submitted a Brief In Support of the Denial of Labor Certification on July 17, 1995.

**Discussion**

The issues are whether the alternate experience requirement of two years as a drywall finisher/taper is unduly restrictive and, if so, whether the Employer established that the requirement is a business necessity.

Section 656.21(b)(2) prohibits the use of unduly restrictive requirements in the recruitment process. They are prohibited because they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer

cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupation Titles* (DOT), the regulation at § 656.21(b)(2) requires that the employer establish business necessity for the requirement.

This Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates, Inc.*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 90-INA-395 (June 30, 1992).

The job offered by the Employer in this case involves duties normally performed by carpenters, not drywall finishers/tapers. Moreover, the Employer did not explain why someone with two years of experience as a carpenter would not qualify as an applicant for the job. (DOT 843.644-010, 842.684-014, and 860.381-022.) The Alien's experience is as a drywall finisher/taper and although a drywall finisher installs wallboard, using hand and power tools and installs studs for the attachment of wallboard, his job duties do not include using wood or plywood to construct, erect, or repair structures. Nor do they include preparing layouts or fastening materials together with nails, dowels, or glue. (DOT 860.381-0220.) Therefore, the Alien lacks experience performing the core duties of the offered job and could not qualify for the job were it not for the Employer's drywall finisher/taper experience requirement.

Since the Employer's experience requirement is the only acceptable qualifying experience and involves job duties which are only marginally related to the duties of the offered job, we agree with the CO that the experience requirement is unduly restrictive and tailored to the Aliens's background.

We find also that the Employer's unsubstantiated and undocumented statements that deleting the drywall experience requirement would "undermine the essence of the business operation" and that preserving the requirement is "essential for the safety and operation of the business" to be unpersuasive (AF 12).

The Employer has not established that experience as a drywall finisher/taper is essential to performing, in a reasonable manner, the job duties described by the Employer, which are essentially those of a carpenter. *Information Industries, Inc.*, *Infra*.

**ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk***
***Office of Administrative Law Judges***
***Board of Alien Labor Certification Appeals***
***800 K Street, N.W., Suite 400***
***Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.